



Generally Speaking

COMINGS and GOINGS

Please welcome

AAG Jennifer Schorr who joined the Anchorage Environmental Section.

Josh Lumbab, Case Manager, Juneau Civil Division. Josh comes from the department's Administrative Services Division.

AAG Thomas "Tab" Ballantine, the newest member of the Anchorage Oil, Gas, and Mining Section.

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The Juneau Administrative Services Division welcomed **Miriha Scalf, Administrative Assistant II**, to their offices this month.

The Bethel DAO is pleased to report **Jessie Gunderson** has joined the staff as the **Office Manager**. **DA Lance Joanis** says Jessie is a welcomed member of the supervisory team and has gotten off to a great start with the offices.

Many congratulations and best wishes to Bethel **DA Lance Joanis** and Bethel Child Protection Section **AAG Jennifer Joanis** on the March 22 arrival of son Jacob Donald Joanis (named after AAG Joanis' grandfather and great grandfather). Jacob weighed in at 8 pounds 10 ounces and measured 21 and 1/4 inches. The family reports older brother Gabe is very happy to have the new addition to the family.

KUDOS

Kristina Oldfield was promoted from the **Administrative Clerk II** position in Legal Support Services to a **Law Office Assistant I** position in Oil, Gas and Mining. **Courtney Dowling** was promoted from the **Law Office Assistant I** position to a **Law Office Assistant II** position supervising the Workers' Compensation unit of Torts & Workers' Compensation. Congratulations to both Kristina and Courtney!

CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in the Office of Children's Services (OCS) petitions:

OCS assumed emergency custody of two children after efforts to stabilize the home failed. The mother has a history of mental illness and

substance abuse. OCS had been working with her since 2006 offering in-home services.

OCS assumed custody of a four-year-old child after receiving two separate reports of harm. The reports alleged that the mother was abusing substances and that the child had been beaten with a spoon. The child had also been present for several domestic violence episodes. The mother tested positive for drugs and the father's whereabouts are unknown.

OCS received a report from school that a 15-year-old girl had welts on her back, allegedly as a result of her mother beating her the night before. The child had previously been in OCS custody. The mother, who was arrested as a result of the incident, did not respond to OCS after the incident. The father is incarcerated.

OCS investigated a report from a hospital that expressed concerns about the domestic violence, mental stability, and drug use of parents who had recently had a baby and were staying at the hospital. OCS attempted to work with the mother to assure the safety of her and her child, but those attempts failed and OCS assumed emergency custody of the baby.

OCS assumed emergency custody of two children after the mother's live in boyfriend allegedly shot and killed their drug dealer on the front lawn. The mother believes her boyfriend to be innocent and has chosen him over her children. There have been prior reports of harm alleging violence and substance abuse in the home. In addition, one child has special needs that have not been appropriately tended to. One child's father is incarcerated and the other child's father lives in Wisconsin.

OCS is seeking custody of a currently incarcerated 17-year-old. She has a substance abuse problem, is desirous of treatment, and her mother—with whom she

did drugs—does not want her back in the home. OCS also has custody of the 17-year-old's recently born, drug-exposed infant.

OCS received a report from the Anchorage Police Department that a small child had cigarette burns on her back and torso. Another child in the home had an untreated skin condition. When APD investigated the home, the adults were hostile and threatening towards the police. There are a number of prior reports of harm on the family and the father's whereabouts are unknown. OCS assumed emergency custody.

Numerous children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/or incarceration.

[Commercial and Fair Business](#)

Consumer Protection Settlement With Directory Billing, LLC

Alaska entered into a multi-state settlement agreement with Directory Billing, Inc., an on-line yellow page directory, requiring the company to stop the use of promotional checks and pay the states a total of \$400,000 to settle charges it violated the states' consumer protection statutes. The states alleged that Directory Billing engaged in deceptive business practices by sending live checks to businesses, churches, schools and other organizations, which, when deposited, obligated the organizations to pay for its on-line yellow page services. The states' investigation revealed that many organizations that received the checks believed them to be refund or rebate checks and did not intend to enter into a contract with Directory Billing when they deposited the checks.

In addition to prohibiting the use of the checks, the settlement requires Directory Billing to send a notice to its current customers allowing them to terminate their contract and obtain a partial refund. This is the fourth multi-state settlement entered into by Alaska relating to the use of promotional checks in the state. The legislature

recently passed legislation proposed by the Department of Law, and sponsored by Representative Lynn, which prohibits the use of promotional checks in Alaska, by making their use an unfair or deceptive practice in violation of the Alaska Unfair Trade Practices and Consumer Protection Act.

State Settles Case With Eli Lilly for \$15 Million

Three weeks into a four week trial, and just three days away from closing arguments, the state accepted a \$15 million offer to resolve claims against Eli Lilly related to its antipsychotic drug Zyprexa. Zyprexa is approved to treat schizophrenia and bipolar mania in adults. The state alleged Lilly failed to warn physicians about the serious side effects of the drug, including diabetes, hyperglycemia, hyperlipidemia, and weight gain. The state's evidence showed that Lilly knew of these side effects soon after the drug was put on the market in 1996, and that Lilly downplayed these risks. Lilly also promoted the drug for "off-label" uses, including depression and mood disorders in children. The state alleged Lilly engaged in this conduct to make up for lost sales of Prozac, which came off patent when Zyprexa was introduced.

The state's case was brought on behalf of the Medicaid Division, which pays for over 70 percent of all Zyprexa sold in Alaska. The trial was bifurcated into a liability phase and a damages phase. The state originally sought hundreds of millions of dollars in penalties and damages under the Alaska Unfair and Deceptive Trade Practices Act, which allows for treble damages and significant civil penalties. Five days before trial, the court dismissed the state's claim for off-label promotions, which significantly reduced the likelihood of high penalty amounts. As the case progressed, the state's damage calculations also became more focused, and were much less than originally projected.

After considering the state's damages and penalty potential, along with the likely appeal of any favorable verdict which would delay payment of any award by years, Attorney General Talis Colberg decided to accept Lilly's offer of \$15 million. The settlement also includes a "most favored nations" clause that requires Lilly to pay Alaska more money if it settles any of the 42 pending Zyprexa cases on more favorable terms so that Alaska will be treated at least as favorably as any other state that settles these claims.

AAG Ed Sniffen headed the litigation of the case, with assistance of outside counsel hired on a contingency fee basis to litigate the case. The state will pay the outside firms 20 percent of the recovery, plus their costs.

Environmental

Department of Environmental Conservation v.

Michael Bateman. AAG Breck Tostevin successfully settled a Department of Environmental Conservation (DEC) cost recovery action in which he recovered the state's hazardous substance cleanup costs at the Wyoming Drive contaminated site in Anchorage's Spenard neighborhood. The property was contaminated with lead and other hazardous substances from an automobile battery recycling operation as well contamination from home heating oil drums.

The state reached agreement with the last insurer in the case, ACE/INA, for payment of \$165,000 and the former property owner for payment of \$144,559 from the sale proceeds of the remediated property. Along with an earlier settlement with State Farm, the state will have recovered \$509,559 which reimburses all of DEC's cleanup contractor costs, DEC staff costs and \$35,000 in legal costs. The latest settlement was the result of a series of summary judgment motions the state filed on cleanup liability and insurance coverage for cleanup cost issues.

Human Services

Litigation Update

Smart v. Department of Health & Social Services (DHSS). AAG Libby Bakalar filed an opposition to a motion for class certification and a second motion to dismiss in this case. (After filing the first motion to dismiss in lieu of an answer, the Northern Justice Project amended their complaint to allege all new causes of action). The case challenges DHSS' statistical extrapolation regulation for Medicaid provider audits.

In The Matter Of South Anchorage Ambulatory Surgery Center. Section Chief Stacie Kraly filed a brief in the superior court appeal related to the decision of the commissioner to deny a Certificate of Need to a joint venture between Providence Hospital and nine physicians to build a six-suite ambulatory surgery center in South Anchorage.

Medicaid

For the month of March to date, the subrogation team collected a total of \$61,152.84 as a result of 19 claim resolutions, including one estate recovery of \$15,970.20. At the present time, the section has an inventory of 750 open and unresolved third-party liability matters involving claims of Medicaid reimbursement and 69 estate and trust recovery matters.

AAG Nevhiz Calik won a contested Fair hearing related to the denial of Intensive Active Therapy to a recipient. This case was brought ostensibly as a recipient appeal, but clearly was a reimbursement/provider issue, as was established by AAG Calik and affirmed by the hearing officer.

Other

AAG Rebecca Polizzotto presented a two-day training seminar to the Office of Children's Services and Child Placement Agencies. The training included a review of the licensing statute (AS 47.32), the barrier crime regulations (7 AAC 10.900-990), due process, report writing, and the administrative hearing process. AAG Polizzotto also provided a two-day training to residential licensing staff covering the same topics.

AAGs Kelly Henriksen, Libby Bakalar and Robin Fowler have done an outstanding job keeping all of the Adult Protective Services matters on track. This has been very challenging since most of the cases are in Anchorage and the section is managing them "remotely." Their efforts are greatly appreciated.

Labor and State Affairs

Education

School Finance. AAG Kathleen Strasbaugh represented the Department of Education and Early Development in an administrative hearing in Anchorage on March 3-7. The Anchorage School District had appealed the Department of Education and Early Development's decision that 26 students the district had identified as requiring intensive special education funding did not qualify, which reduced the district's funding. School districts receive significantly higher funding for students identified as requiring intensive special education. A decision is pending.

On March 5 Administrative Law Judge (ALJ) Hemenway issued a proposed decision in the Delta/Greely School District's appeal from the Department of Education and Early Development's decision to reclassify as a *construction* project a grant request for a Capital Improvement Project (CIP) that the district had characterized as a *maintenance* project. The grant request was for \$37 million in improvements to a high school. A CIP project is classified based upon five categories, A) avert imminent danger, B) unhoused students, C) protection of structure, D)

correct code deficiencies, E) achieve operating cost savings, and F) improve instructional program. A CIP project involving categories A, B, E, or F, is a construction project, a project involving categories C or D is a maintenance project. The ALJ found that the project had a mixed scope, including both maintenance and construction.

In a detailed analysis of the project as a whole, considering the large amount of interior reconfiguration of the school, the educational specifications, comparison with other projects, and the cost of work, the ALJ determined that the majority of the work was in categories A, E, and F – construction. Although the ALJ did not entirely agree with the department’s analysis, he found that the district failed to establish that the majority of the work in the project was primarily required for code compliance and protection of the structure. He concluded that a reasonable basis supported the department’s determination that the primary purpose of the project was to improve the school’s instructional program, correct dangerous conditions, and achieve operating cost savings, which are construction items, rather than maintenance. AAG Sarah Felix represented the department.

Elections

Clean Water Litigation. There are five water quality initiatives that have been proposed: 07WATR, 07WTR2, 07WTR3, 07WIFI, and 07FISH. Three, 07WTR3, 07WIFI, and 07FISH, have been certified, allowing the petitions to be circulated for signatures, which is an important preliminary step to appearing on the ballot. The state is the defendant in several lawsuits involving both proponents and opponents of the initiatives. Superior Court Judge Douglas L. Blankenship issued a decision in 07WATR and 07WTR3 on February 29. The Lieutenant Governor prevailed in Blankenship’s decision on both initiatives at issue. On 07WATR, Judge Blankenship ruled that the initiative was an

impermissible appropriation. In particular, he relied on language in *McAlpine v. University of Alaska*, 762 P.2d 81 (Alaska 1988), suggesting that it was impermissible to change the function of assets by initiative. Judge Blankenship declined to consider the other arguments made (regarding takings, preemption, and special legislation). His decision affirming the decision not to certify 07WATR conflicts with an October ruling by Superior Court Judge Fred Torrisi to certify it. Judge Torrisi’s decision is on appeal to the Alaska Supreme Court.

On 07WTR3, Judge Blankenship agreed with the Lieutenant Governor that the proposed initiative was permissible regulation. In particular he agreed that it was appropriate to imply the word “adverse” before effect in interpreting the initiative to be regulatory in nature. Judge Blankenship rejected all arguments made against the 07WTR3 initiative, including appropriation, takings, special legislation, and preemption. On both initiatives, Judge Blankenship upheld the ballot summary and statement of costs.

Another lawsuit has been filed challenging the Lieutenant Governor’s decision in one of the other, related, initiatives—07WIFI. 07WIFI bans mixing zones in the state, and the Lieutenant Governor certified it as a regulatory, and therefore permissible, initiative. Although the complaint contesting certification of 07WIFI was filed in December, it was not served until March.

Employment

State v. Alaska Public Employees Association. On March 20, AAG Bill Milks argued this case before the Alaska Supreme Court. The state’s appeal seeks to vacate a labor arbitrator’s award of prejudgment interest. At issue is whether the state has sovereign immunity from awards of prejudgment interest in labor arbitrations and, if so, whether the defense was waived. The availability of prejudgment interest in labor arbitrations was also before the Court in February in *State v. Alaska State Employees Association*.

Alaska State Employees Association (ASEA) also filed an appeal with the superior court to overturn

the decision of the Alaska Labor Relations Agency's decision to allow the probation officers to vote over whether they should be severed from the general government bargaining unit represented by the ASEA, and added to the unit represented by the Alaska Correctional Officers Association. AAG Bill Milks will be representing the state's interest in this appeal.

Human Rights Commission

Billingham v. Alaska State Commission for Human Rights. On February 15, the superior court upheld the commission's decision after remand. The court initially had reversed a commission decision that no substantial evidence supported an employment complaint alleging unlawful sex and age discrimination and then remanded the case to the commission for additional investigation. Following additional investigation, which included an examination of personnel records obtained with a court order that the state as the employer had withheld under AS 39.25.080, the commission again found that the complaint lacked evidentiary support. The court upheld this second decision. AAG Bill Milks represented the commission in the appeal.

Municipal Taxation

Coonrod/ACLU v. State. On February 28, Judge Spaan held oral argument on dispositive motions. At issue was the validity of Chapter 44, SLA 2006, amending AS 29.45.030(b)(1), to extend to religious organizations a tax exemption for teacher housing. The Municipality of Anchorage has historically provided such an exemption to a secular educational institution, Alaska Pacific University, for its faculty housing. The ACLU and individual plaintiffs made a facial challenge to the statute, claiming it violates the Establishment, Due Process (void-for-vagueness), and Equal Protection Clauses of the state and federal constitutions. Plaintiffs also claim that the statute violates the "one subject" rule of the

Alaska Constitution. Judge Spaan presided over a two-hour oral argument to a packed courtroom, including media. The state took the position that there is a comparable exemption under the educational use exemption of the Alaska constitution and statutes; however, in the alternative, the state argued that exact parity of exemptions is not required by *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

Thus, even if there were no exemption for educator housing for secular institutions, the broad-based exemption scheme would satisfy *Walz*. Two intervening parties (churches) also argued in favor of upholding the statute. AAG Krista Stearns argued the case and former AAG Richard Postma did the briefing; the decision is pending.

Legislation and Regulations

During March the Legislation and Regulations Section spent a busy month editing legislation for introduction in the regular session. The section also edited bill reviews for bills passed during the regular session. The section also edited and legally approved for filing the following regulations projects: 1.) Department of Revenue (tax on gaming or gambling activities aboard large passenger vessels; charitable gaming regulations); 2.) Department of Commerce, Community, and Economic Development (Real Estate Commission for management of real property in which licensee has an ownership interest; Board of Examiners in Optometry for licensure, continuing education, and pharmaceutical agent prescription and use endorsements; State Physical Therapy and Occupational Therapy Board for supervision); and 3.) Division of Elections (administration of elections and local and regional elections).

Natural Resources

Board of Fisheries Meeting

AAG Lance Nelson participated in the Alaska Board of Fisheries regulatory meeting from March 3–8, which dealt mainly with statewide king and Tanner crab issues, but also included adoption of a regulatory framework for eco-tourism fisheries, which was covered by AAG Steven Daugherty.

Board of Game Meetings

From February 28–March 9, AAG Kevin Saxby attended the annual spring Board of Game meeting in Fairbanks. The meeting generally covered hunting regulations and related issues for Interior Alaska, but also addressed a new predator control plan for the Southern Alaska Peninsula Caribou Herd, located near the tip of the Alaska Peninsula. The herd is in severe decline and has had almost no calf survival for several years now.

Defenders of Wildlife, et al. v. State. On March 13, the superior court issued a comprehensive summary judgment order in the consolidated lawsuits initiated by the Defenders of Wildlife, Friends of Animals, and others, which challenge the state's existing predator control plans and programs. The court ruled that the board did not violate the Administrative Procedures Act in adopting changes to its predator control regulations following the last round of litigation. The court also ruled that the current plans are sufficient to meet the "plan" requirement under Alaska's same-day airborne law. The court ruled in favor of the state's interpretation as to how "harvestable surplus" must play into predator control decision making. The court ruled that, while the constitution requires sustained-yield management of predators, the state's management does not violate that principle. The court also ruled that the state does not owe the plaintiffs any duty to apply any

particular level of science to its decision making. And, the court ruled that the state's predator control programs comply with all statutory requirements, with two exceptions noted below.

The court's adverse rulings are as follows. First, the court ruled that, while the board has the authority to adopt bounty programs, it has not done so, making an attempted "incentive" program unlawful. Second, the court ruled that, because they are not supported by separate written findings, the extensions of two predator control plans into adjacent areas did not comply with statutory requirements. Those programs were ordered to be halted because of this failing. The board met in emergency session to correct the failings identified by the court on March 21. The two invalidated plans were repealed and readopted, based on these corrections. The programs in these two areas are, thus, now back in operation. All parties have filed requests for reconsideration of the court's order. AAG Kevin Saxby represents the state in these cases.

State Files Reply Brief in *Katie John "Which Waters" Litigation.* On March 17, the state filed its brief in reply to the briefs of the United States, the Katie John plaintiffs, and the Alaska Federation of Natives which had been filed in this case in January and February. Under the court's scheduling order, this will probably be the state's last substantive filing during this stage of the proceedings until the court issues a decision. In this federal district court litigation the parties seek to determine the parameters of federal subsistence jurisdiction in navigable water bodies throughout Alaska, following two appellate court decisions several years ago which held that such jurisdiction exists in "certain" navigable water bodies in which it is determined the United States holds "federal reserved water rights." Those court decisions left it to subsequent proceedings to determine which water bodies qualify. (This litigation was explained in more detail in last month's report). AAG Mike Sewright is the attorney chiefly representing the state in this matter together with outside counsel.

Alaska Center for the Environment v. State.

AAG Anne Nelson filed the state's brief in the Alaska Center for the Environment's (ACE) appeal of the Department of Natural Resources (DNR) Commissioner's decision to offer the Copper Timber Sale near Willow. ACE argues that the sale is based on outdated land use planning documents and therefore violates the sustained yield management mandate of the Alaska Constitution. ACE also argues that the commissioner's finding that the sale is in the state's best interests is flawed. The state's brief argues that the land use planning documents remain valid and support the commissioner's determination that the sale is in the state's best interest and complies with sustained yield management principles. The appeal is being heard in Palmer Superior Court and should be fully briefed and ready for judicial decision by mid-April.

Oil, Gas, and Mining

Point Thomson Unit Litigation

This matter arose out of a November 2006 decision of the Department of Natural Resources (DNR) Commissioner to terminate the Point Thomson Oil and Gas Unit on the North Slope, in part, for the Lessees' failure to submit an acceptable unit plan of development. The Anchorage Superior Court upheld the commissioner's decision on all points except unit termination, which the court remanded to DNR for additional proceedings. In response to Judge Gleason's decision, DNR and the Lessees held a hearing on March 3-7. During the hearing, the Lessees presented as their proposed remedy a new plan of development that planned to drill exploration wells and put the unit into production by 2014. Most of the hearing was devoted to the technical aspects of the plan. DNR is reviewing the briefs and testimony and will issue a decision by June.

Opinions, Appeals & Ethics

Ethics

AAG Judy Bockmon is working on two written advisory opinions, and addressed a variety of informal ethics inquiries in March. She continues work on several investigations, and is preparing the public summary of the quarterly reports from the ethics supervisors.

AAG Bockmon also met with the Lieutenant Governor, his staff, and Linda Perez, the Governor's Office Administrative Services Director. She briefed them on the restrictions relating to political campaign activities under the Ethics Act and other authority, and revised existing handouts for their guidance. She also traveled to Juneau to provide training at the Department of Transportation and Public Facilities (DOTPF) SE Project Engineers conference, and conducted a training session for the Board of Psychologists and Psychological Examiners and the Alaska Oil and Gas Conservation Commission.

Appeals/Litigation

P.R. v. Office of Children's Services (OCS).

On March 18, AAG Mike Hotchkin presented oral argument to the Alaska Supreme Court. This Indian Child Welfare Act case involves a grandmother's appeal of a superior court finding that the grandmother is not the Indian custodian of three children who are in the custody of the state Office of Children's Services. The grandmother claims to be the child's Indian custodian both by virtue of tribal custom (testimony indicated that traditionally in Kotzebue, when a parent is unable to care for a child the maternal grandmother often steps in to help out) and by her daughter having transferred physical custody of the children to her. The effect of a finding that the grandmother is the children's Indian custodian will be that the trial court will have to dismiss the CINA case and release the children to the grandmother "forthwith," unless to do so would place the children in substantial and immediate danger.

The state argued that tribal custom does not cover this family's situation because (1) the tribal expert testified that she was unaware of any situation where family members had been unable to agree about the transfer of custody (the father in this case disagrees that the grandmother should be raising the children – he prefers that his parents fill that role), (2) as a factual matter, the grandmother never took over responsibility for raising the children, and (3) under the tribal custom, “legal custody” – *i.e.*, the responsibility for making the major decisions in a child's upbringing – does not vest in a person who simply steps in to help an incapacitated parent raise a child. (The grandmother argues that the term “legal custody” must be interpreted in light of the tribe's customs rather than according to federal and state law definitions.) The state also argues that the mother did not transfer physical custody, as demonstrated by testimony that the mother, not the grandmother, retained the responsibility for making the decisions about the children's day-to-day care.

Hinkle v. State, Department of Environmental Conservation (DEC). AAG Dave Jones prepared a brief to the Alaska Supreme Court opposing an effort by the owners of contaminated commercial property along the Kenai River to set aside a settlement reached with them in 2000. In that settlement, the owners agreed to pay part of the cost of cleaning up dry cleaning solvent on their property, where they formerly ran a dry cleaning business. The settlement, which was formalized in a consent decree, required them to pay \$300,000 within 60 days and \$1.3 million, with interest, within 10 years. Although they made the initial \$300,000 payment, they have since sought to avoid the remaining payment obligations. In 2006, they asked the superior court to vacate the decree, arguing that the court should not have held them liable for the cleanup costs and that the state and its attorneys had violated various duties and misled them. The superior court concluded

that their motion to vacate the decree was too late and meritless, so they appealed to the Alaska Supreme Court. In the state's brief, the section argued that the superior court did not abuse its discretion in rejecting their efforts to set aside the decree.

Sheldon v. City of Ambler. AAG Mary Lundquist was successful in convincing the Alaska Supreme Court to modify its test for qualified immunity in excessive force cases. In *Sheldon v. City of Ambler*, slip op. 6238 (Alaska Mar. 14, 2008), the Court affirmed the trial court's grant of summary judgment to a Village Police Officer on the ground of qualified immunity. The state (represented by AAG Mary Lundquist) participated as an amicus in the case and had asked the Court to overrule *Samaniego v. City of Kodiak*, 2 P.3d 78 (Alaska 2000) and bring the state test for qualified immunity in line with the U.S. Supreme Court case of *Saucier v. Katz*, 533 U.S. 194 (2001). *Samaniego* had relied on the then-current Ninth Circuit analysis in *Katz v. United States*, which was reversed by the U.S. Supreme Court (in *Saucier v. Katz*) the year after *Samaniego* was decided. The state argued that the test in *Samaniego* subsumed the test for qualified immunity into the test for whether there had been a constitutional violation.

Although the Court declined to explicitly overrule *Samaniego*, it modified and re-interpreted *Samaniego* to bring it in line with federal case law. Under *Sheldon*, the Court engages in a two-part inquiry to determine whether qualified immunity applies: 1) Did the defendant's conduct violate the constitution? 2) If there was a constitutional violation, then was the right violated “clearly established” such that the state actor was on clear notice that his actions were unlawful? Under this second prong, an officer is entitled to qualified immunity if the officer reasonably believed (even if that belief is mistaken) that the force used was lawful. Thus, an officer is entitled to qualified immunity from excessive force claims unless no officer in his position could have reasonably believed that the actions were lawful. This re-interpretation of *Samaniego* brings state law in line with federal precedent and will protect state and municipal defendants from shouldering

the burdens of litigation where they make reasonable mistakes under pressure.

DeNardo v. Carr. The superior court issued an order granting summary judgment to Judge Joannides and issued a pre-filing order in *DeNardo v. Carr and Judge Stephanie Joannides* (Case No. 3AN-05-10726). DeNardo sued Judge Joannides (via an amended complaint) related to her denial of DeNardo's motion for recusal for cause in the original case of *DeNardo v. Carr*. The court granted summary judgment to Judge Joannides because the complaint did not allege that Judge Joannides took any improper action, and, even if it had, she is immune from suit for her judicial actions.

The court also granted the state's motion for a pre-filing order. The court found that a pre-filing order was warranted because "DeNardo's litigation activity is sufficiently abusive of the judicial process to warrant a finding that he is a vexatious litigant." The court also found that DeNardo's litigation activity is "unfairly repetitive, burdensome, and abusive" and amounts to harassment. The pre-filing order (issued by the Presiding Judge of the Third Judicial District) sets out specific steps that DeNardo must follow in order to have summons for newly-filed complaints issued by the court, and in order to prevent dismissal of complaints sua sponte by the court. The pre-filing order applies to all future complaints and amended complaints that Mr. DeNardo files in the Third Judicial District. This case was handled by AAG Mary Lundquist.

Regulatory Affairs and Public Advocacy (RAPA)

Attorney General Appellee Brief

Supreme Court No. S-12788 (3AN-05-11721/RCA No. U-04-22&23), AWWU. The joint brief of appellees Regulatory Commission of Alaska (RCA) and the

Attorney General/Public Advocate was filed with the Alaska Supreme Court on March 27. The matter is before the Supreme Court on further appeal by the Municipality of Anchorage d/b/a Anchorage Water and Wastewater (AWWU) from Superior Court Judge Volland's ruling (on AWWU appeal) that upheld the Regulatory Commission of Alaska (RCA) below. The issues on appeal concern the RCA's disallowance of AWWU's proposal to include in consumer rates a \$6 million dollar increase in the Municipal Utility Services Assessment (MUSA) that the Municipality assessed against its water and wastewater utility. RAPA's AAG Steve DeVries successfully advocated for the disallowance of MUSA in the RCA adjudicatory hearing and on appeal to superior court.

Adjudicatory Hearing Completed

RCA/U-07-76&77, Fairbanks Water & Sewer.

RAPA presented its case and cross-examined that of the investor-owned utility during a scheduled Regulatory Commission of Alaska (RCA) adjudicatory hearing that was held in Fairbanks during the week of March 3-7. Golden Heart Utilities and College Utilities Corp. previously initiated their third rate case in as many years, this time seeking a 5 percent rate increase for each of three consecutive years for water and sewer services in the Fairbanks service area.

The utilities presented five witnesses. RAPA AAGs Sam Cason and Glenn Gustafson presented staff witness Janet Fairchild and contract expert witness Randall Woolridge. RAPA litigated numerous aspects of the utilities' proposed revenue requirement (including rate case, lobbying and organizational expenses), and also challenged aspects of their proposed rate base, including rate of return. Post-hearing briefs are to be filed by April 2 after which the case will be ready for RCA disposition.

New Case

RCA/U-08-25, Enstar tariff reconsideration

refunds. This case arose out of various informal complaints handled by the Regulatory Commission of Alaska (RCA) Consumer Protection staff from

Enstar Natural Gas Co. (Enstar) customers who asserted that they are due refunds because of a reclassification of service that should apply to them under the utility's tariff. Enstar provided refunds to some customers of the difference between small commercial rates and residential rates, relating back to its 2003 rate design. The commission subsequently ordered the utility to offer refunds to any customer who turned in the rate adjustment after the closure of a prescribed notice period deadline.

Enstar sought reconsideration of that decision on the assertion that the commission based its decision on an implied erroneous factual finding made upon an inadequate evidentiary basis which the utility had no opportunity to contest. The RCA granted reconsideration on February 15, 2008 for the purpose of taking additional evidence and argument. Responsive to RCA invitation, RAPA filed a notice of the attorney general's election to participate in this case on March 25. Under the circumstances of this case, RAPA's participation may be somewhat limited in nature. A schedule for further proceedings has not yet been set.

Transportation

Right-of-Way Hearing Held

The Federal Highways Administration requires the Alaska Department of Transportation and Public Facilities (DOTPF) to remove advertising signs from state highway rights-of-way. The owner of a sign advertising a gas station applied to DOTPF for a permit that would allow their sign to remain in the right-of-way. Upon denial, the owner appealed to a DOTPF administrative panel for an adjudicatory hearing. AAG Susan Urig represented the DOTPF unit that had denied the permit. A decision is pending.

Clean Water Act Response Lodged

The U.S. Environmental Protection Agency (EPA) asserts DOTPF and construction contractors under contract to DOTPF violated the Clean Water Act at several sites in Southcentral Alaska. AAGs Jim Cantor, Steve Ross, and Susan Urig helped DOTPF develop a written response to the EPA's factual and legal allegations.

CRIMINAL DIVISION

Anchorage DAO

Anchorage conducted 10 trials and 50 grand juries this month.

ADA Aaron Sperbeck continued his onslaught of sex trials. He secured the conviction of Alfred Allen on attempted penetration of another CSP (Community Service Patrol) client. Both Allen and the passed out victim were being escorted in a van to the sleep-off center. When the two CSP employees went into a hospital to pick up another client, Allen attempted to violate the woman. CSP caught him in the act. The victim never knew. Allen faces approximately 25 years to serve based on his prior record.

ADA Michal Stryszak tried Burt Mercurief for an armed robbery with a knife. Mercurief stole \$100 from an 18-year-old college student who was riding a bicycle home to the dorms. The college student's credibility was the primary issue. The jury did not express any reservation about believing the sober college student. Mr. Mercurief now faces 10-14 years for the robbery.

ADA Michelle Tschumper tried Dale Ferguson for a DUI. Ferguson blew a 0.00 on the Datamaster, but a Drug Recognition Expert determined he was under the influence of a narcotic analgesic. The defense was that his bad driving was a result of his taking his medication while driving and that he was not impaired until the blood test, three hours later. In openings, defense counsel made accusations of a tainted blood test because his client was diagnosed with

herpes and hepatitis a week later. After the state noticed up a rebuttal expert, no testimony was elicited on this subject. The jury convicted in 10 minutes.

ADAs John Darnall and Joy Green-Armstrong secured a conviction of a juvenile in a sexual assault one trial. The defense alleged that the juvenile had masturbated near the victim's underwear and that that fact explained the evidence on the six-year-old victim. The jury disagreed. Of note, the timid victim used her teddy bear to hide her face from the defendant (her cousin) when she walked out of the courtroom.

In a sentencing of note, ADA Brittany Dunlop advocated a maximum sentence for residential burglar Randall Gehrke. Gehrke attempted to break into a downtown residence. The owner heard the break-in and confronted Gehrke with a replica gun. Gehrke ran but was caught quickly. He had six prior felonies and received a composite sentence of nine and one-half years to serve.

Barrow DAO

A 49-year-old Barrow resident was indicted on February 7 for misconduct involving a controlled substance in the fourth degree. The North Slope Borough police, in conjunction with postal authorities, intercepted nearly 11 pounds of pot headed for Barrow. A controlled delivery was made in Barrow to the defendant. An associate posted his \$50,000 bail immediately, in wads of cash which had the odor of marijuana (the cash posting was eventually seized by federal authorities who were already in the midst of a forfeiture action against the defendant for a previous case in which another substantial amount of cash was seized). A week later, the local police got a search warrant for the defendant's house based on newly discovered evidence and found (while he was still incarcerated) 15 grams of pot and another \$11,800 in cash, which was seized

this time by the state. This case is still pending and is also being simultaneously pursued by the U.S. attorney's office. The street value of 11 pounds of pot in Barrow is about \$200,000. At a bail hearing the judge described this as "definitely a wholesale operation." A May trial date is pending.

A 35-year-old Barrow resident was indicted on February 7 for being a felon in possession of a firearm. The defendant had assaulted and terrorized his wife and best friend in the weeks preceding his arrest. He was a known threat to the police and his arrest came mainly because his wife finally got sick of the whole situation. She called the police and told them about the gun, which when found, was wrapped in a Ziploc bag with holes cut out for the barrel to protrude and a hole for the magazine. It was rigged in such a way to neither get his fingerprints on the gun, nor get gun powder on his hands if fired. The defendant has two other assault cases pending and two additional assault charges pending in the felon in possession case.

Bethel DAO

The grand jury returned true bills on quite a few alcohol and drug cases, in addition to various sexual assaults in the first and second degrees, and sexual abuse of minor cases. One sexual assault case involved multiple rapes of a blind college student at the Bethel UAF campus dorms. The defendant returned repeatedly over a long period of time to the victim's room and forced sex many times. The victim finally reported to a counselor who encouraged her to report. The defendant admitted that at least three of the encounters were forced.

On a lighter note, the DAO has instituted a new method of pulling files for the next day's court calendar, which has been a big success. It has freed up time for the LOAs and clerk to accomplish other tasks and keeps everyone from wandering around looking for files. DA Lance Joanis compliments and thanks the staff for their implementation of the new system, and also

thanks Kenai DA June Stein and her office, since the Bethel DAO took this idea from them.

Fairbanks DAO

The offices had eight trials during the month, including a felony sexual assault trial in Delta. Forty-one cases were presented to the grand jury.

A middle-aged, Korean-born husband-wife duo seemed distinctively out of place at their in-custody district court arraignments in early March. They were well dressed and appeared notably more affluent than the average criminal defendant. For good reason – who knew that operating a seedy “massage parlor” could bring in \$1 million or more a year? For years, law enforcement had known that “Lee’s Massage Parlor,” housed in a run-down former motel not far from the back gate to Fort Wainwright, probably offered something more than a standard licensed massage. Their suspicions were confirmed as Alaska State Troopers conducted a welfare check in mid-February following the report of a physical fight between a customer and the male owner/manager.

When the “masseurs” and their clients did not come out of the back rooms after repeated commands, one of the troopers went in for a safety check and found a naked male. The “masseur” hurriedly tried to cover him up and then scuttled away. When interviewed, several “johns” who charged their purchases on credit cards over the past months admitted they had paid the owner for a half-hour or an hour of various sexual services from the one of the two or three employees. The business’ credit card sales, estimated to be a small percentage of the total monthly revenue, totaled between \$25,000 and \$40,000 per month for the last several months. At the grand jury presentation the jurors said they’d heard enough and asked if they could skip the last couple of scheduled witnesses before voting

to indict both husband and wife on charges of promoting prostitution in the second degree. A June trial date is pending.

A Fairbanks jury convicted a 30-year-old Fairbanks resident of C felony fraudulent use of an access devise. He cleaned out his girlfriend’s bank account of \$780 with a debit card which she had given him to use “for emergencies only”. The defense argued that since the girlfriend authorized him to use the debit card under some circumstances, his act of exceeding her expectations of his use was a civil matter, not a criminal one. The jury didn’t buy it and convicted him. Sentencing is set for June.

Juneau/Sitka DAO

March was another active month for both the Juneau and Sitka offices.

During the month, the Juneau offices handled the following cases:

Tara Stuart was charged with two counts of assault in the third degree, action of operator immediately after accident, driving while under the influence, refusal, and three counts of reckless endangerment stemming from a hit-and-run accident on March 1. Ms. Stuart was seen getting into the driver’s seat of a vehicle after being asked to leave a downtown bar for being highly intoxicated. Ms. Stuart proceeded to hit several guardrails and another vehicle. She continued driving after striking the other vehicle and eventually stopped several miles past the accident.

Joseph Cox, 35, was indicted on March 7 for two counts of misconduct involving a controlled substance in the first degree and seven counts of sexual abuse of a minor in the second degree. Mr. Cox would provide the 14-year-old victim with heroin and methamphetamine before having sexual intercourse with her.

Ryan Griffin and Angel Gonzales were indicted on March 21 in connection with the burglaries of two residences on March 6 and 7. In addition to

electronic equipment, they also stole several firearms and a vehicle. The vehicle was extensively damaged as the defendant had lost control due to excessive speed and drove into a ditch.

Also on March 21 the grand jury returned indictments on Aaron Washington and Vonnie Williams. Mr. Washington was charged with one count of misconduct involving a controlled substance in the first degree for a continuing criminal enterprise and 18 counts of aiding and abetting misconduct involving a controlled substance in the third degree. Mr. Williams was charged with one count of misconduct involving a controlled substance in the first degree for a continuing criminal enterprise and 15 counts of aiding and abetting misconduct involving a controlled substance in the third degree. Both defendants were involved in extensive cocaine importation using several females to carry the drugs from the lower 48 to Juneau between 2005 and 2007.

Mr. Williams was previously indicted in January for theft in the second degree. In that case, the same females who were used to import cocaine were cashing forged checks and providing him with the money they obtained. He was then indicted in February for misconduct involving a controlled substance in the fourth degree as he was found in possession of cocaine when he was arrested on the warrant for the theft case.

Mr. Washington had also been indicted in January, but on two cases of misconduct involving a controlled substance in the third degree and misconduct involving a controlled substance in the fourth degree. Both cases involved the distribution of cocaine along with maintaining a residence for the distribution of controlled substances.

In Sitka, Jason Abbot was arrested for four counts of murder in the first degree. The grand jury indicted him on four counts of murder one, and one count of attempted

murder one. He is represented by Marcy McDannel of the Office of Public Advocacy.

The Sitka DAO remodeling and expansion is quickly coming to a close. The staff have done an amazing job dealing with the chaos associated with working in a construction zone and have even won several trials.

[Kenai DAO](#)

March was significant for the number of new crimes, both felony and misdemeanor. The grand jury was busy with many crimes against people and began with eight felony assaults. They ranged from an axe-wielder to a variety of stranglers and a very near vehicular fatal.

In one of the strangulations, a wife strangled her husband. The husband recanted at grand jury but at that point there was a felony criminal mischief. The wife was so out of control on the way to the jail that the officer had to stop his vehicle four times to refasten her in the back seat. The last time he stopped, he was assisted by a canine officer and she was eventually tied up with dog leashes. By the time she was handed over to the jailers, she had broken out two windows of the car. There were many "ear" witnesses to the incident as the officer was on the phone with dispatch and the on-call ADA as the glass was being shattered.

An assault turned into a sexual assault when three guys were drinking and one got the other two angry. Not only did the two beat the third male with the wooden handle of a tool, they also sodomized him with it. The grand jury charged assault in the first degree and sexual assault in the first degree.

The grand jury returned an indictment against Bruce Brown for brutalizing his girlfriend by way of an assault two and two assaults three. In 1994 Brown was involved in the murder for which Billy Smith was convicted. According to the victim in this case, who is thirty years younger than the defendant, the defendant was extremely

controlling, prohibiting her from using the telephone or having friends.

ADA Angela Jamieson presented a case to the grand jury with charges of endangering the welfare of a child. A father, who, according to his estranged wife, was under the influence when he picked up the baby, abandoned the child in a vehicle because he thought that the police were looking for him. The child, just over two-years-old, was not in a car seat. The defendant parked the car at the gas pumps so that it was not conspicuous, and in fact the police did not find the vehicle. The defendant fled and subsequently called his wife and asked her to pick him up, never mentioning that he had left the child behind in the vehicle. As she was driving by the gas station, she discovered the unattended vehicle. The defendant was successful in his flight and the officers did not find him in sufficient time to charge a DUI. However, the grand jury was very quick to bring forth the child abuse charge.

In a near-fatal, the defendant was DUI and crashed into several vehicles in the oncoming traffic lane. All the victim drivers were credited by their passengers with excellent driving that prevented them from being killed. After being struck, one vehicle burst into flames and was completely burned to the metal frame. Fortunately the occupants got out just in time. The grand jury indicted on eight counts of assault in the third degree, and ADA Kelly Lawson filed Information adding counts for DUI and driving while revoked.

The grand jury also heard a case involving the death of a 17-year-old boy. He was shot by his sister's boyfriend who said he picked up a semi-automatic pistol instead of the Airsoft pellet gun he meant to pick up. The defendant killed the boy with one shot. Through the investigation blood was drawn from the defendant, and he was found to have a cocktail of various controlled substances. The grand jury returned an

indictment charging criminally negligent homicide.

There were also property crimes this month.

The Soldotna Chamber of Commerce operates a pull-tab store, with a significant volume of business judging by the receipts. When the yearly report was run, it was discovered that the store was not returning the 20 percent per month profit that it was designed to do. Rather, in some months it was making only one or two percent. It came to light that one of the employees embezzled more than \$50,000 over a six-month period. She confessed, in hopes of their not reporting it to the police. She was wrong.

There was a bit of humor as well during the month. Several people purchased Whizzinators or Urinators over the Internet and used them to tamper with the evidence of their samples. There is also a local store in Soldotna where one can purchase presumably drug-free urine for \$35 a sample.

One of Kenai's new judges had a learning experience when he remanded a defendant for violating his conditions of release on a felony eluding case. Over the ADA's objection that the defendant was a flight risk, the judge allowed him to go into the hallway to call his mother; needless to say, the defendant fled. The grand jury indicted him for escape and failure to appear.

New misdemeanors were plentiful as well and the offices are currently gearing up for the summer/fall fishing and hunting seasons and the resulting wealth of violations.

[Kodiak DAO](#)

A Kodiak jury acquitted a defendant of an assault committed on a local homeless man. The defense produced a witness saying he had been on the phone with the defendant when he heard the defendant say "you spit on me?" The court granted a defense motion for a self-defense instruction. Following the trial, Judge Bolger adjudicated the defendant of having violated his

probation in a separate misdemeanor. He remains in custody, after having pled to a three count indictment charging him with felony forgery and theft. He is pending sentencing proceedings before the superior court in the felony case. Additionally, the defendant has another misdemeanor assault and harassment trial pending before the district court in April, arising out of an incident with another inmate at the Kodiak jail during which time he is alleged to have hit and spat on another inmate.

The grand jury returned a six count indictment on a local massage therapist alleging sexual assault involving two victims.

In separate incidents, two Kodiak men were indicted for knife assaults.

A Kodiak woman was indicted for two counts of felony assault following her involvement in two car accidents. She is also charged with driving while intoxicated.

An Egyptian national was indicted on two counts of assault in the first degree and kidnapping after two detectives driving in the downtown area witnessed him striking the victim. Consequent investigation resulted in the detectives discovering the victim had some older injuries and had also been bitten.

A Kodiak man was indicted for vehicle theft.

Two local men were arrested for driving a boat in the harbor while intoxicated. A harbor officer observed them drinking and then operating the vessel in a peculiar manner. One of the men was indicted for felony driving under the influence and breath test refusal.

Kotzebue DAO

Enos Good, a third-felony offender out of Noorvik, received seven years to serve

between his most recent felony – pulling a knife on an arresting trooper – and attendant probation violations.

Several major indictments were returned:

David Foster on four counts of sexual assault against a minor one for engaging in sexual intercourse with his now 13-year-old victim several times over the past two years.

Elijah Rock on two counts of sexual assault one, for sodomizing a 17-year-old Point Hope boy.

Glenn Octuck on one count of third degree assault and other charges for threatening his girlfriend with a loaded gun and then hiding it.

Nome DAO

On March 7 Peter Irrigoo called Nome Police to report that Salvadore Cambell of Gambell had just run from his house holding something inside his coat. Irrigoo found his front door ajar, a freezer door open, and an empty space where a large package of walrus, seal and dried seal meat had been placed. Irrigoo was upset, because as he explained, whenever Cambell comes to Nome, he sneaks into the house and steals food. Police, with the help of a number of interested civilians, tracked Cambell to Front Street where they found him highly intoxicated. Cambell denied stealing any meat, but eventually agreed to help recover the stolen food. Campbell first took the officer to several empty holes in the sea wall where he “may have” squirreled away the meat, and then to a flop house where he “may have left it”. No meat was recovered. Cambell was arrested and later convicted for misdemeanor theft. Probation conditions for the next two years direct Cambell to stay out of Nome without court permission, and if he does return, to stay away from the Irrigoo’s home.

Palmer DAO

On March 18 Judge Kristiansen sentenced Jamie Brewington on multiple felony counts including theft

in the second degree, fraudulent use of an access device, forgery in the second degree and scheme to defraud for his role in mailbox thefts and check forgeries. Brewington had prior felony convictions of a similar nature. He received a composite sentence of six years to serve, with additional suspended time and probation for 10 years. He was also ordered to pay restitution in an amount exceeding \$18,000. Prosecuting this case was ADA Suzanne Powell.

Mark Dunder was sentenced on charges of sexual abuse of a minor in the first degree, sexual abuse of a minor in the second degree, and distribution of child pornography, to a total of 36 years, with 9 years suspended, (27 years to serve) and sex registration for the rest of his life. The judge also ordered, as a condition of a 15-year probation period, that Dunder not use any electronic devices capable of accessing the internet. ADA Rachel Gernat was the prosecutor.

Mark Ambridge pled guilty to one count of sexual abuse of a minor in the second degree for touching his daughter's nine-year-old friend when she was sleeping over at his house. Ambridge remains in custody and is facing 5-15 years in prison. ADA Rachel Gernat handled this case for the state.

Colleen Wood was convicted, after a jury trial, of tampering with physical evidence. Wood, a felon on probation, smuggled a bottle with urine into the probation office to provide as a sample in order to avoid testing positive for drugs. The plan went wrong when she dropped a small rubber band into the collection cup. This prompted probation officers to question the validity of the sample, and she eventually admitted that she had been using drugs. Wood testified at her trial and explained how she filled the bottle with her urine a couple of days before taking methadone, put foil secured by rubber bands over the top of the bottle, and

inserted the bottle into her body before the probation visit. The trial prosecutors were ADAs Alison Collins and Mike Perry.

Michelle Wood was convicted after a jury trial of DUI. ADA Mike Perry was the trial prosecutor.

Office of Special Prosecutions and Appeals (OSPA)

Appellate Unit

Duncan v. State. The Alaska Court of Appeals sided with AAG Ken Rosenstein's arguments that Anchorage police officers had acted properly when, acting on a store owner's report, they frisked and then arrested the defendant for drug possession. The store owner had called the police and told them that he believed he had just witnessed a drug deal take place in front of his store between the defendant and another person.

Gates v. State. The Alaska Court of Appeals agreed with AAG Diane Wendlandt that a superior court's interpretation of a new statute governing credit for time served was not the interpretation that had been intended by the legislature. Accordingly, the court of appeals reversed the superior court and remanded for further proceedings on the defendant's application for credit.

Manrique v. State. AAG Blair Christensen convinced the Alaska Court of Appeals that the defendant was not an appropriate candidate for sentencing outside the legislature's presumptive sentencing scheme. The defendant had argued that his community involvement and lack of any prior record entitled him to be sentenced to less than the eight-year presumptive term for a first degree sexual assault.

Holden v. State. The Alaska Court of Appeals held that, despite the statutory prohibition on such appointments, an indigent defendant is entitled as a constitutional matter to the appointment of counsel on an untimely application for post-conviction relief. In March the appeals unit filed

a petition for hearing to have the Alaska Supreme Court review and ultimately reverse the court of appeals' ruling.

Rural Unit

March involved much travel to Bethel for the Rural Unit to assist while the office is understaffed. An attorney from the unit was present in Bethel for each of the four weeks of the month. The rural paralegal also assisted in helping the office and worked on two sexual abuse cases that the office is handling entirely.

Jamison Wagner was sentenced on an assault in the third degree case from Emmonak. He had been living with a school teacher from that village and during a drinking party, injured one person and threatened several others. He was sentenced to four years with 33 months suspended.

Aaron Thomas was sentenced on a second degree murder charge for the January 2007 death of Nellie Frank. He received a 60-year sentence with 25 to serve. The 25-year-old defendant beat the woman to death by the use of his hands, elbows, and knees.

A 20-year-old Kotlik man was indicted for several felony counts including murder in the first degree of his friend after a night of drinking home brew.

SAVE THE DATE

National Association of Attorneys General
Summer Meeting
Providence, RI - June 17-19, 2008

Conference of Western Attorneys General
Annual Conference
Seattle, WA - August 3-6, 2008